ILLINOIS POWER AGENCY

NOTICE OF PROPOSED RULES

1) Heading of the Part: Recovery of Costs Incurred in Connection with the Cancellation of Facility Development and Construction

2) Code Citation: 83 Ill. Adm. Code 1240

3)

Section Numbers:	Proposed Actions:
1240.10	New Section
1240.20	New Section
1240.30	New Section
1240.100	New Section
1240.110	New Section
1240.120	New Section
1240.130	New Section
1240.200	New Section
1240.210	New Section

4) Statutory Authority: 20 ILCS 3855/1-20(b)(23); 20 ILCS 3855/1-35(2); 20 ILCS 3855/1-80

5) A Complete Description of the Subjects and Issues Involved: The IPA's primary authority for these rules extends from the following provision of the Illinois Power Agency Act:

Sec. 1-35. Agency rules. The Agency shall adopt rules as may be necessary and appropriate for the operation of the Agency. In addition to other rules relevant to the operation of the Agency, the Agency shall adopt rules that accomplish each of the following:

Establish procedures for the recovery of costs incurred in connection with the development and construction of a facility should the Agency cancel a project, provided that no such costs shall be passed on to public utilities or their customers or paid from the Illinois Power Agency Operations Fund. (20 ILCS 3855/1-35(2)).

Additional authority related to these rules can also be found in Section 1-80 of the Illinois Power Agency Act [20 ILCS 3855/1-80], as that Section describes at length why, when, and how the Agency would actually undertake the development and construction of a facility.

In developing draft rules, the Agency was informed by the following considerations:

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First, there is a very low likelihood of the Agency developing an electric generation or co-generation facility in the foreseeable future. When the Agency was created in 2007, it was anticipated that there could be a need for new power plant construction to serve municipal utilities and rural electric cooperatives. A role was carved out for the IPA to potentially develop such projects. However, changes in electric prices, the electric power development industry, and the economy have all resulted in that function being unnecessary. Additionally, the law requires that the first facility developed by the Agency "shall be a facility that uses coal produced in Illinois" and "must be a clean coal facility . . . constructed in a location where the geology is suitable for carbon sequestration" [20 ILCS 3855/1-80(c)], presenting unattractive economics for potential counterparties.

As a result, the IPA does not anticipate developing any power plants in the short and medium term. As any project must first begin development before being cancelled, the likelihood of the Agency calling upon these rules is both very remote and prescribed to a very prescriptive and predictable path should it occur.

Second, the Agency would not choose to develop a facility at its own discretion. While the law does not expressly prohibit it from doing so (assuming other legal requirements of the project were satisfied, such as those concerning the initial facility), the law only envisions such projects serving "municipal electric systems, governmental aggregators, or rural electric cooperatives" [20 ILCS 3855/1-80(d)] with allowance only for selling "excess energy and excess capacity into the wholesale market" [20 ILCS 3855/1-80(f)].

As a result, any IPA electric generation or co-generation facility development would only occur should an Illinois municipal utility, governmental aggregator, or rural electric cooperative (or some combination thereof) do the following:

1) Identify a significant long-term electric supply need;

2) Determine that despite the strictures of the IPA Act (especially with respect to the type of facilities that can be developed), an IPA-developed project is the preferred way to meet that supply need; and

3) Be willing to enter into long-term power purchase agreements for the facility's output sufficient to allow the facility to be financed.

Third, parties should still retain remedies that would otherwise available to them at law. Simple fairness and good policy dictates that the rule should not preempt recovery from a party directly responsible for the cancellation of an otherwise viable project. For instance, if a project's failure stems from faulty or untimely work from a contractor or sub-contractor, then the IPA's administrative rules should not preclude recovery from those parties.

Fourth, individual projects and counterparties may require different cancelled project cost recovery procedures for successful development. The IPA Act envisions projects under $100 million in cost, projects between $100 million and $1 billion in cost, and projects over $1 billion—and specifies different requirements for each. Similarly, the IPA Act envisions both clean coal facilities (which are likely to be large, expensive projects given the associated infrastructure) and renewable energy projects (which could be large and expensive, but may be small and less expensive) both potentially being developed. As the risk and consequences of project cancellation varies considerably by project type, flexibility is desirable.

With these considerations in mind, the IPA has drafted the following rules related to procedures for the recovery of costs incurred in connection with the development and construction of a facility should the Agency cancel a project. The Agency believes that these draft rules allow it to meet statutory requirements while allowing it the necessary flexibility to handle the wide variety of project types contemplated by the law.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None

7) Will this rulemaking replace any emergency rule currently in effect? No

8) Does this rulemaking contain an automatic repeal date? No

9) Does this rulemaking contain incorporations by reference? No

10) Are there any other rulemakings pending on this Part? No

11) Statement of Statewide Policy Objective: This rulemaking does not create or expand a State mandate.

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12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Comments should be filed, within 45 days after the date of this issue of the *Illinois Register* with:

Brian P. Granahan
Chief Legal Counsel
Illinois Power Agency
160 N. LaSalle St., Suite C-504
Chicago IL 60601

312/814-4635
Brian.Granahan@Illinois.gov

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: This rule may impact small municipalities who operate or work in connection with municipal or co-operative electric utilities that could potentially seek to engage the Illinois Power Agency on a facility development project.

B) Reporting, bookkeeping or other procedures required for compliance: Compliance would require the development of a binding memorandum of understanding before any facility development project was undertaken and associated costs were incurred.

C) Types of professional skills necessary for compliance: No specific professional skills are necessary for compliance with this rule.

14) Regulatory Agenda on which this rulemaking was summarized: This rulemaking was not summarized in a prior Agency regulatory agenda, but will be summarized in the Agency's July 2015 regulatory agenda.

The full text of the Proposed Rules begins on the next page:

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TITLE 83: PUBLIC UTILITIES
CHAPTER III: ILLINOIS POWER AGENCY
SUBCHAPTER a: CONTRACTS AND FEES

PART 1240
RECOVERY OF COSTS INCURRED
IN CONNECTION WITH THE CANCELLATION OF
FACILITY DEVELOPMENT AND CONSTRUCTION

SUBPART A: INTRODUCTION

Section

SUBPART B: MEMORANDUM OF UNDERSTANDING

Section

SUBPART C: OTHER REMEDIES

Section

AUTHORITY: Implementing and authorized by Section 1-35(2) of the Illinois Power Agency Act [20 ILCS 3855/1-35(2)] and Section 1-80 of the Illinois Power Agency Act [20 ILCS 3855/1-80].

SOURCE: Adopted at 39 Ill. Reg. _____, effective _____.

SUBPART A: INTRODUCTION

Section 1240.10 Purpose and Scope

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The purpose of this Part is to *establish procedures for the recovery of costs incurred in connection with the development and construction of an electric generation or co-generation facility should* the development of that facility be cancelled and to ensure that none of *these costs are passed on to public utilities or their customers or paid from the Illinois Power Agency Operations Fund*. (Sec. 1-35(2) of the Act)

Section 1240.20 Definitions

The following terms are defined for this Part:

"Act" means the Illinois Power Agency Act [20 ILCS 3855].

"Agency" or "IPA" means the Illinois Power Agency.

"Clean coal facility" means an electric generating facility that uses primarily coal as a feedstock and that captures and sequesters carbon dioxide emissions at the following levels: at least 50% of the total carbon dioxide emissions that the facility would otherwise emit if, at the time construction commences, the facility is scheduled to commence operation before 2016, at least 70% of the total carbon dioxide emissions that the facility would otherwise emit if, at the time construction commences, the facility is scheduled to commence operation during 2016 or 2017, and at least 90% of the total carbon dioxide emissions that the facility would otherwise emit if, at the time construction commences, the facility is scheduled to commence operation after 2017. The power block of the clean coal facility shall not exceed allowable emission rates for sulfur dioxide, nitrogen oxides, carbon monoxide, particulates and mercury for a natural gas-fired combined-cycle facility the same size as and in the same location as the clean coal facility at the time the clean coal facility obtains an approved air permit. All coal used by a clean coal facility shall have high volatile bituminous rank and greater than 1.7 pounds of sulfur per million btu content, unless the clean coal facility does not use gasification technology and was operating as a conventional coal-fired electric generating facility on June 1, 2009 (the effective date of Public Act 95-1027). (Section 1-10 of the Act)

"Costs incurred in connection with the development and construction of a facility" means:

the cost of acquisition of all real property, fixtures, and improvements in connection therewith and equipment, personal property, and other property, rights, and easements acquired that are deemed necessary for the operation and maintenance of the facility;

financing costs with respect to bonds, notes, and other evidences of indebtedness of the Agency;

all origination, commitment, utilization, facility, placement, underwriting, syndication, credit enhancement, and rating agency fees;

engineering, design, procurement, consulting, legal, accounting, title insurance, survey, appraisal, escrow, trustee, collateral agency, interest rate hedging, interest rate swap, capitalized interest, contingency, as required by lenders, and other financing costs, and other expenses for professional services; and

the costs of plans, specifications, site study and investigation, installation, surveys, other Agency costs and estimates of costs, and other expenses necessary or incidental to determining the feasibility of any project, together with such other expenses as may be necessary or incidental to the financing, insuring, acquisition, and construction of a specific project and starting up, commissioning, and placing that project in operation. (Section 1-10 of the Act)

"Facility" means an electric generating unit or a co-generating unit that produces electricity along with related equipment necessary to connect the facility to an electric transmission or distribution system. (Section 1-10 of the Act)

"Governmental aggregator" means one or more units of local government that individually or collectively procure electricity to serve residential retail electrical loads located within its or their jurisdiction. (Section 1-10 of the Act)

"Indigenous coal" means coal produced within the State of Illinois.

"Memorandum of Understanding" means a document that expresses mutual accord between two or more parties on one or more issues.

"Municipal electric system" has the same meaning as used in Section 1-80 of the Act. (Section 1-10 of the Act)

"Local government" means a unit of local government as defined in Section 1 of Article VII of the Illinois Constitution. (Section 1-10 of the Act)

"Project" means the planning, bidding, and construction of a facility. (Section 1-10 of the Act)

"Public Utility" has same meaning as found in Section 3-105 of the Public Utilities Act. (Section 1-10 of the Act)

"Renewable energy resources" includes energy and its associated renewable energy credit or renewable energy credits from wind, solar thermal energy, photovoltaic cells and panels, biodiesal, anaerobic digestion, crops and untreated and unadulterated organic waste biomass, tree waste, hydropower that does not involve new construction or significant expansion of hydropower dams, and other alternative sources of environmentally preferable energy. For purposes of this Act, landfill gas produced in the State is considered a renewable energy resource. "Renewable energy resources" does not include the incineration or burning of tires, garbage, general household, institutional, and commercial waste, industrial lunchroom or office waste, landscape waste other than tree waste, railroad crossties, utility poles, or construction or demolition debris, other than untreated and unadulterated waste wood. (Section 1-10 of the Act)

"Rural electric cooperative" has the same meaning as used in Section 1-80 of the Act. (Section 1-10 of the Act)

Section 1240.30 Statement of Policy

The Agency will not undertake the development and construction of an electric generation or co-generation facility without reliable *procedures* in place *for the recovery of costs incurred in connection with the development and construction of that facility* should such a project be cancelled. Further, because that facility would be built to meet the electric supply needs of municipal electric systems, governmental aggregators, or rural electric cooperatives, the Agency will not undertake the development and construction of an electric generation or co-generation facility without a binding, executed agreement with entities to which the facility's electricity output would be sold.

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SUBPART B: MEMORANDUM OF UNDERSTANDING

Section 1240.100 General

The Agency shall not undertake the development and construction of a facility without having first executed a binding Memorandum of Understanding with a municipal electric system, governmental aggregator, or rural electric cooperative requiring that counterparties collectively purchase at least 90% of the electricity projected to be generated by the facility over a period of no less than 10 years.

Section 1240.110 Provisions Required

The Memorandum of Understanding required by this Part must include at least the following provisions:

a) The type of facility (whether a clean coal facility using indigenous coal, a facility using renewable energy resources, or both) to be developed and constructed by the Agency;

b) The location of the facility to be developed and constructed by the Agency;

c) The contract term length applicable to power purchase agreements to be executed between the municipal electric system, governmental aggregator or rural electric cooperative and the Agency;

d) A projected price range (stated in dollars per megawatt-hour) estimated to reflect the price to be charged for electricity generated for purchase under power purchase agreements to be executed between the Agency and the municipal electric system, governmental aggregator or rural electric cooperative;

e) A provision indicating that the electricity supplied to the municipal electric system, governmental aggregator or rural electric cooperative under power purchase agreements shall be supplied at cost;

f) A provision ensuring that the municipal electric system, governmental aggregator or rural electric cooperative supplied with power and energy from an Agency facility shall supply the power and energy to retail customers at the same price paid to purchase power and energy from the Agency;

g) A provision prohibiting electric utilities from being required to purchase electricity directly or indirectly from the facility;

h) If the facility is a clean coal facility, plans for the capture and sequestration of carbon dioxide emissions.

Section 1240.120 Cancelled Project Cost Recovery Procedures

a) The Memorandum of Understanding required by this Part shall also set forth agreed procedures for the recovery of Agency costs should the development and construction of a facility be cancelled. Such procedures must describe the process for the recovery of all Agency costs incurred in connection with the development and construction of a facility.

b) Necessary Clauses
The cancelled project cost recovery procedures required by this Part must contain also the following:

1) A description of the process to be used by a party to the Memorandum of Understanding to cancel the development of a project, triggering the application of cancelled project cost recovery procedures;

2) A clause stating that under no circumstances may cancelled facility costs be recovered from public utilities or their customers; and

3) A clause stating that under no circumstances may cancelled facility costs be recovered from the Illinois Power Agency Operations Fund.

c) Subsequent Agreements
Cancelled project cost recovery procedures contained in the Memorandum of Understanding required by this Part shall be binding upon the parties and reflected in any subsequent agreements entered into between the parties to the extent necessary to give them full force and legal effect, including in any power purchase agreements between the Agency and any municipal electric system, governmental aggregator, or rural electric cooperative.

d) Clean Coal Projects
If the facility is a clean coal facility, cancelled project cost recovery procedures contained in the Memorandum of Understanding required by this Part must also

extend to any plans for the Agency to develop, finance, construct, or operate a carbon sequestration facility.

Section 1240.130 Power Purchase Agreements

Nothing about the requirement of a Memorandum of Understanding contained in this Part is intended to preclude the Agency from entering into power purchase agreements with a municipal electric system, governmental aggregator, or rural electric cooperative for the purchase of electricity generated by a facility.

SUBPART C: OTHER REMEDIES

Section 1240.200 Remedies Under Contract

Nothing in this Part shall be construed as prohibiting the Agency or any party with which it contracts, including the municipal utility, governmental aggregator and rural co-operative with which it has entered into a Memorandum of Understanding, from seeking relief through remedies under contract or remedies at law in connection with a project's development, construction or cancellation.

Section 1240.210 Remedies At Law

Nothing in this Part shall be construed as prohibiting the Agency or any party with which it contracts, including the municipal utility, governmental aggregator, and rural co-operative with which it has entered into a Memorandum of Understanding, from seeking relief through remedies at law in connection with a project's development, construction, or cancellation.